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IN THE

Supreme Court of the United States

CITY OF MESA,
Petitioner,
v.

CRAIG W. PETERSEN,
Respondent.

On Petition for a Writ of Certiorari to the
Arizona Supreme Court

BRIEF OF *AMICUS CURIAE*, THE INSTITUTE FOR A DRUG-FREE WORKPLACE, IN SUPPORT OF THE PETITIONER

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TABLE OF CONTENTS

I. INTEREST OF THE AMICUS 1

II. SUMMARY OF ARGUMENT 2

III. ARGUMENT 4

A. THE *PETERSEN v. CITY OF MESA* DECISION IS OF KEEN INTEREST TO THE EMPLOYER COMMUNITY 4

(1) There are Comparable Jobs to Firefighters In the Private Sector 5

(2) Private-Sector Employees and Property are at Risk if Public-Sector Firefighters are Substance Abusers 6

(3) American Employers in Regulated Industries Typically Adopt Their Substance-Abuse-Prevention Programs for *All* Employees 7

(4) The Reversal of Federally Mandated Random Drug Testing Would Be Costly and Unfair 8

(5) Invalidating Random Testing Could Create a Litigation Explosion 9

(6) Unless Reversed, *Petersen v. City of Mesa* Will Have a "Chilling Effect" on Employers 10

(7) The Credibility of Random Drug Testing Will Be Tarnished 11

(8) Many Private-Sector Employees Work at Public-Sector Work Sites and Public-Sector Employees' Health and Safety *Could* Detrimentally Affect Them 12

(9) There is a "Revolving Door" Between the Public and Private Sectors and Private Sector Employer Expect That the Public-Sector Employees Be Drug-Free 13

(10) Individualized Suspicion Testing is Not Enough – In the Public or Private Sectors 14

B. THE ARIZONA SUPREME COURT'S DECISION CONFLICTS WITH THE WEIGHT OF LAW AND RECOGNIZED PUBLIC POLICY 15

(1) The U.S. Supreme Court Has Supported Testing for Safety-Sensitive Employees 16

(2) The U.S. Congress and Federal Agencies Support Testing For Safety-Sensitive Employees 17

(3) Many States Support Random Testing 18

IV. CONCLUSION 19

TABLE OF AUTHORITIES

FEDERAL CASES

Board of Education of Independent Sch. District No. 9 v. Earls, 122 S. Ct. 2559 (2002) 16

Chandler v. Miller, 520 U.S. 305 (1997) 16

Dimeo v. Griffin, 943 F.2d 679 (7th Cir. 1991) 16

Eastern Associated Coal Corp. v. United Mine Workers of Amer., 531 U.S. 57 (2000) 16

Guiney v Roache, 873 F.2d 155 (1st Cir. 1989) 16

Hartness v. Bush, 919 F.2d 170 (D.C. Cir. 1990) 16

Hatley v. Department of the Navy, 164 F.3d 602 (Fed. Cir. 1998) 16

International Brotherhood of Teamsters v. Department of Trans., 932 F.2d 1292 (9th Cir. 1991) 16

National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) 16

Penny v. Kennedy, 915 F.2d 1065 (6th Cir. 1990) 16

Policemen's Benevolent Association of New Jersey, Local 318 v. Township of Washington, 850 F.2d 133 (3d Cir. 1988) 16

Rushton v. Nebraska Public Power District, 844 F.2d 562 (8th Cir. 1988) 17

Shoemaker v. Handel, 795 F.2d 1136 (3d Cir. 1986) 17

Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989) 16

Thompson v. Marsh, 884 F.2d 113 (4th Cir. 1989) 16

Vernonia Sch. District v. Acton, 515 U.S. 646 (1995) 16

FEDERAL STATUTES

Omnibus Transportation Employee Testing Act ("OTETA"), 49 U.S.C. § 5331 (1991) 17

FEDERAL REGULATIONS

10 C.F.R. Part 26 (2003) 18

10 C.F.R. Part 707 (2003) 18

14 C.F.R. Part 121 17

46 C.F.R. Part 16 (2003) 17

48 C.F.R. § 252.233-7004(c)(4)(i)(2003) 18

49 C.F.R. Part 199 (2003) 17

49 C.F.R. Part 219 (2003) 17

49 C.F.R. Part 382 (2003) 17

49 C.F.R. Part 655 (2003) 17

I. INTEREST OF THE AMICUS[1]

The Institute for a Drug-Free Workplace ("the Institute") is a non-profit coalition of major businesses and business organizations dedicated to promoting and protecting the interests of employers and employees in effective and responsible drug-abuse-prevention programs. The Institute includes in its membership many of the largest employers in the United States, and a wide range of companies of all sizes, chambers of commerce, trade associations, and community coalitions.

Among other functions, the Institute disseminates information to assist in the development of workplace drug-abuse-prevention and -treatment programs, and to positively influence the national, state, and local consideration for drug-abuse-prevention issues. The Institute is uniquely positioned to provide relevant and helpful information on the nature and dangers of substance abuse, and on the design and implementation of effective policies and programs to combat substance abuse in the workplace, particularly where such policies and programs promote the safety and welfare of employees, their co-workers, and the public at large.

The Institute has a significant interest in the questions presented in *Petersen v. City of Mesa*. By holding that the City of Mesa ("Mesa") cannot randomly test its firefighters – a recognized safety-sensitive job – the Arizona Supreme Court has failed to recognize the catastrophic consequences that substance abuse can and does have on American workplaces – *particularly* substance abuse by employees in

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[1] The Institute hereby certifies, in accordance with Rule 37.6 of this Court, that no counsel for a party authored this brief in whole or in part, and no person or entity, other than the Institute for a Drug-Free Workplace, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

safety-sensitive positions. The decision inappropriately and unjustifiably undermines Mesa's, and by extension private-sector employers', ability to provide safe workplaces and to take necessary and appropriate steps to protect life and property.

The Institute's members – and the employer community at large – have a strong interest in ensuring that the random-testing component of their drug-free-workplace policies and programs will *not* be undermined by the Arizona Supreme Court's decision. This decision, if not reversed by the Court, could drastically affect private-sector employers' drug-free-workplace policies and programs by calling into question the legality of random drug testing – a practice which has the greatest deterrent impact on employee substance abuse; by inviting legal challenges; by having a "chilling effect" on employers' commitment to random drug testing and aggressive substance-abuse-prevention programs, even for the most safety-sensitive of positions; and therefore by indirectly jeopardizing the safety and health of millions of Americans.

II. SUMMARY OF ARGUMENT

The disturbing decision of the Arizona Supreme Court in *Petersen v. City of Mesa* has the potential to reach far beyond the public sector, and to substantially and detrimentally impact the *private* sector and the entire legal and practical landscape surrounding workplace substance-abuse-prevention and drug-testing programs.

The decision is contrary to the body of jurisprudence in this area – including the U.S. Supreme Court's past decisions on drug testing, contrary to the oft-repeated positions and requirements of the U.S. Congress and several Federal

Government agencies, and contrary to common practice and wisdom.

Moreover, the impact on the employer community – and its employees – would be enormously harmful – both in regulated and unregulated industries.

Perhaps most harmful to the private sector would be the principles articulated by the Arizona Supreme Court: that random drug testing is somehow unfair and unnecessary (even for highly safety-sensitive positions); and that individualized suspicion should be required for employee testing and is adequate to deter and detect employee drug abuse.

Among the many *private*-sector consequences of this decision, the mischaracterization of the nature and value of random drug testing, and drug testing overall, is among the most troubling. This mischaracterization, if not corrected, is dangerous to the employer community *and* to American society overall.

Unless the U.S. Supreme Court reverses the Arizona Supreme Court's decision – *and* if the Arizona Supreme Court's heretofore unique interpretation of the law were to be more widely adopted – there will be *more* challenges to current and effective workplace substance-abuse-prevention programs, *more* drug abuse, *less* treatment (because of the lower number of substance-abuse problems identified), *more* workplace accidents, *more* drug-related injuries and fatalities, and a *less* safe Arizona and America.

The Institute for a Drug-Free Workplace respectfully urges the U.S. Supreme Court to grant *cert* to the Petitioner in *Petersen v. City of Mesa*, and subsequently to reverse this

decision that is so undermining of our national policy on workplace substance-abuse prevention.

III. ARGUMENT

A. THE *PETERSEN v. CITY OF MESA* DECISION IS OF KEEN INTEREST TO THE EMPLOYER COMMUNITY.

Although *Petersen v. City of Mesa* concerns a public-sector employer and public-sector employee firefighters, this decision has the potential to tremendously and detrimentally impact private-sector employers and employees.

Random drug testing is part of the fabric of American corporate culture in 2004. It is entrenched, accepted, widely in use, growing in popularity, and proven to be both effective and cost-effective.

The private-sector employer community is opposed to any assault on random drug testing, particularly one that challenges the validity of random drug testing *even* in the context of highly safety-sensitive positions such as firefighters.

Moreover, a negative decision on random drug testing – such as that rendered by the Arizona Supreme Court – could cast an enormous shadow over the employer community's legal and practical assessment of random drug-testing policies and programs.

Seminally at stake is the *concept* of random drug testing – whether it is legal, appropriate, justified, and effective...and whether it prevails in a balancing test between the legitimate privacy rights of the individual, and the societal, employer, and employee interests in preventing

substance abuse and its myriad deleterious effects in our workplaces and in our communities.

Again and again, this Court – and virtually all of our Federal courts of relevant jurisdiction at all levels – have resolved this balancing test *in favor* of drug testing as a useful, legitimate, appropriate, and even necessary *means* to prevent a highly undesirable *end* – the loss of life and property that substance abuse so often and so tragically claims.

What is at stake for the private-sector employer community in *Petersen v. City of Mesa*? The health, safety, and well-being of its workers, and those who use its products and services. *This* is high stakes.

(1) <u>There are Comparable Jobs to Firefighters in the Private Sector</u>.

Many employers – in essence – have their *own* fire departments, or comparable employee units in their workplaces. This is particularly true for the petrochemical, construction, and mining industries – especially at certain remote or highly dangerous work sites. Whether the employees are designated as firefighters, or have firefighter (and/or related) responsibilities, the principles are the same.

Yes, the Fourth Amendment's protections against unreasonable searches and seizures are not directly relevant to private-sector employees (unless their drug testing is mandated by the Federal Government).

However, the fundamental *justification* for random drug testing of safety-sensitive employees is equally at issue. "Safety-sensitive" is defined the same way in the private and public sectors; random drug testing is conducted virtually

identically in the private and public sectors; and the potential harms from impaired and/or substance-abusive employees are mirror images in the private and public sectors.

Even if the comparable jobs are not firefighters, they can be in other corporate disciplines of a health- and safety-sensitive nature: security, emergency response, medical, safety and health, environmental, and damage control units within a private-sector work force would all be highly analogous to firefighters in their safety-sensitive nature.

(2) Private-Sector Employees and Property are At Risk If Public-Sector Firefighters are Substance Abusers.

Employers – like other elements of our communities – *rely* upon firefighters and related government employees (e.g., law enforcement, ambulance attendants, rescue teams) to be available, responsive, and effective.

Frequently, employees' lives are at risk. Public safety may be at risk. Protection of property from destruction – or from further destruction – may be at stake. The prevention of injuries, or the minimizing of the severity of injuries, and even the survival of significant numbers of people may be in the balance.

If public-sector firefighters are unavailable due to substance-abuse-related injuries and illnesses, treatment, or adverse employment action… *or* are "underperforming" due to impairment caused by substance abuse… *or* are otherwise absent, distracted, *or* conflicted by their substance-abuse problems – employers and employees in the private sector may well be, indirectly, the victims.

Employers and employees – like others in our communities – *need* a substance-abuse-free firefighter work force at its best, fully functional, and highly effective and responsive.

(3) American Employers in Regulated Industries Typically Adopt Their Substance-Abuse-Prevention Programs for *All* Employees.

Most employers – given the choice of two distinctly different, and in major respects contrary, substance-abuse-prevention and testing programs, *or* one consistent universally applied program – choose "one."

Thus, for example, most employers with significant numbers of employees subject to the U.S. Department of Transportation's ("DOT") substance-abuse-prevention regulations, choose to *extend* the same policy and programs to *all* of their employees equally.

Thus, if the illogic of the Arizona Supreme Court were to be widely adopted, random testing under the DOT rules would be *highly* vulnerable to legal challenge, and – in turn – voluntary corporate policies and programs based on the DOT model *also* would be significantly called into question.

To invalidate random testing in the *public* sector is to – arguably – invalidate all federally mandated random drug testing in the *private* sector, because the Fourth Amendment basis on which the Arizona Supreme Court decided *Petersen v. City of Mesa* is equally applicable to federally mandated drug testing in the private sector.

If employers, in turn, are forced to dismantle their current DOT-compliant substance-abuse-prevention policies and programs due to the unconstitutionality rulings of the

Arizona Supreme Court, and/or other courts, these employers will simultaneously abandon their parallel policies and programs as applied to non-DOT-covered employees (as would happen for employees subject to comparable U.S. Department of Energy, U.S. Nuclear Regulatory Commission, and U.S. Department of Defense regulations...and their non-covered, employee counterparts).

The results would be wasteful, counterproductive to the goal of substance-abuse-prevention, chaotic, and deplorable as a wholesale retreat from what works – and works *well* – in the necessary and appropriate war on drugs.

(4) <u>The Reversal of Federally Mandated Random Drug Testing Would Be Costly and Unfair</u>.

Moreover, how fair would this be to the American employer community? Having been told by Federal Government agencies – and indirectly by the U.S. Congress – that you *must* combat substance abuse in your workplaces, you *must* do extensive random drug and alcohol testing, you *must* expend many millions of dollars and staff hours, and other resources, on very specific and comprehensive substance-abuse-prevention policies and programs, they would now – in essence – be told that their *mandated* efforts were unconstitutional and inappropriate.

The reversal would carry a huge price tag, as the costs – directly and indirectly – of dismantling a substance-abuse-prevention and testing program could far exceed the costs of its initial implementation.

Among these costs could be the costs of potential legal liability. What happens to those employees who were fired – or job applicants who were denied employment – as a result of an employer's testing and/or compliance with DOT

regulations (or other Federal agency regulations), regulations which could – based on the Arizona Supreme Court's reading of the Constitution – be illegal? Are there not myriad and enormous potential legal liabilities?

(5) Invalidating Random Testing Could Create a Litigation Explosion.

Beyond the legal issues involving employees in regulated industries, it is clear that the legal landscape on drug testing overall would be drastically altered if the *Petersen v. City of Mesa* decision were to be widely embraced by the courts. If *firefighters* cannot be randomly tested, what would be the justification for assembly line workers, construction crews on the road, or forklift operators – let alone employees in more traditional "white-collar" working environments?

The debate would be reshaped. The premise – currently widely held – that drug testing is a good and necessary tool would be under increasing, and more compelling, attack. The plaintiffs' bar would be emboldened. There certainly would be more legal challenges, more of a backlog in the courts, and more expenses – unnecessary and unproductive expenses – to employers in defending the onslaught of challenges. If *firefighters* cannot be randomly tested, who can be?

Moreover, the higher likelihood of legal challenges, and the uncertainty of their outcomes, could render some employers more hesitant to take adverse employment action against employees who violate their substance-abuse-prevention policies and/or test positive (i.e., employees who *deserve* adverse employment action).

Employers who heretofore have largely been given the "green light" by the courts to do drug testing, could suddenly

become "gun shy" about taking adverse employment action against those who engage in the criminal behavior of illicit drug use. How can that possibly be a good thing?

The legal principles and precedents on workplace drug testing were crystal clear. Employers who did drug testing in the most responsible and accurate ways had little to fear legally.

Petersen v. City of Mesa would – if not reversed – change that. The waters would be muddied. Employer rights – and, for that matter, the rights of drug-abuser employees – would be fluid and open and subject to further debate and challenge.

What was settled – and appropriately so – would become unsettled. The law of random drug testing in the private sector would – at the least – become uncertain.

(6) Unless Reversed, *Petersen v. City of Mesa* Will Have a "Chilling Effect" on Employers.

"Uncertain" is not something in-house counsel at corporations like.

Many have condoned – even embraced – random drug testing (and other forms of drug testing *and* elements of a substance-abuse-prevention program) *because* the law was supportive – and their rights as an employer were clear.

If the new legal "order" calls into question random drug testing of even those individuals who are engaged in the most highly safety-sensitive of duties, then the perception may become that the tide has turned – or is turning – on random drug testing, drug testing in general, and maybe even comprehensive substance-abuse-prevention efforts.

Some employers, who were considering adopting such policies and programs, may not do so. Some who were planning an expansion of their current policies and programs, may not do so. Random drug testing, steadily gaining in use in the workplace, may recede in usage and popularity.

It is not just "about" the dismantling or abandonment of programs, as discussed earlier (e.g., DOT-compliant programs and their employer-voluntary extensions to non-covered employees, *or* DOT-look-alike programs), it is also about those policies and programs that would have been adopted and are not – *because* such a radical decision as *Petersen v. City of Mesa* is now part of the equation.

(7) <u>The Credibility of Random Testing Will Be Tarnished</u>.

Petersen v. City of Mesa, a public-sector employee decision, also detrimentally impacts random drug testing in the *private* sector because the image of random drug testing is badly harmed by the decision – and its attendant press coverage.

The message from the Arizona Supreme Court – for some people at least – is that we do not need random drug testing, even for highly safety-sensitive employees, that testing based on individualized suspicion is fair and adequate and random testing is unfair and excessive, and that the courts look unfavorably on random testing as a practice.

The *perception* of random drug testing may be altered in many peoples' minds, reasonable people, people who otherwise would have readily accepted the practice – especially people in Arizona.

The problems with this misguided message are that: (1) it undermines many employer drug awareness and education programs; (2) it contradicts employers' repeated communications that random drug testing is appropriate and necessary (and, indeed, in employees' interests since it helps promote more drug-free and safer workplaces); and (3) it increases the likelihood of morale problems, pushback, lack of cooperation, and/or legal challenges.

At stake in the minds of the public – and more specifically, to employees *and* managers – is the rationale for, credibility of, and effectiveness of random drug testing.

Employers in the private sector often can work so vigilantly to get their messages through to their work force, to garner "buy-in" from their managers and employees into their substance-abuse-prevention programs, and to justify the need for and appropriateness of their drug-testing policies.

Petersen v. City of Mesa undermines these efforts, has a highly negative "public relations" impact, and harms the image and credibility of random drug testing. The U.S. Supreme Court has the opportunity to restore and renew the credibility and prestige of random drug testing as an employment practice.

(8) Many Private-Sector Employees Work at Public-Sector Work Sites and Public-Sector Employees' Health and Safety *Could* Detrimentally Affect Them.

There is a large government contractor work force – particularly here in the Washington, DC area – which routinely works in Federal Government buildings and/or on Federal Government property.

Thus, if Federal employees are impaired on-the-job – and/or if their public-sector employees' substance-abuse problems are not effectively addressed, deterred, detected, and treated – the impact on their "co-worker" private-sector government-contractor employees can be highly detrimental, threatening, even tragic – particularly when the employees are in safety- or security-sensitive positions and/or at safety- or security-sensitive locations.

It is not just firefighters for whom we strive to make it absolutely certain that they are drug-free. What about those employees in law enforcement, military, medical research, air traffic control, the penal system, border protection, and comparable fields – public-sector employees who often work side-by-side with private-sector employees?

Government contractors – and their employees – clearly have a direct and compelling interest in their public-sector counterparts being drug-free – and being randomly tested to help achieve this end.

(9) <u>There is a "Revolving Door" Between the Public and Private Sectors and Private-Sector Employers Expect That Public-Sector Employees Be Drug-Free</u>.

DOT employees frequently "graduate" to work for major airlines or railroads. The Federal Bureau of Investigation and the U.S. Drug Enforcement Administration agents routinely retire to go to work in corporate security. National Institutes of Health researchers commonly leave to work at private health care facilities, universities, and/or pharmaceutical companies.

As those of us in Washington, DC are particularly aware, there is a "revolving door" between the public and private sectors.

The private sector has a legitimate and compelling interest in being assured that those employees they hire – particularly those from the Departments of Defense, Transportation, and Energy, or from the Nuclear Regulatory Commission, are *not* substance abusers and do not have a past history of substance abuse. These are the types of employees for whom impairment can cause catastrophic workplace accidents, breaches in security, and/or destruction of property. Every appropriate precaution should be taken *prior* to hiring and inclusion in a safety-sensitive or security-sensitive environment.

Certainly, a history of "negative" random-drug-test results while in the government is helpful to the private-sector's hiring decisions and evaluations. Take away this useful means of evaluations, and the process is compromised. Screening out current drug abusers is even *more* critical.

(10) <u>Individualized Suspicion Testing is Not Enough – In the Public *or* Private Sectors</u>.

Finally, the logic of the Arizona Supreme Court that individualized suspicion as a trigger to drug testing ("for-cause" testing) is adequate to deter and detect illicit drug abuse is highly flawed – and dangerous to both the public and private sectors.

If a workplace-drug-testing program is based exclusively on individualized suspicion – few employees will be tested and fewer yet will be "caught." The deterrent effect will be negligible.

One Institute member – a major high technology company – conducted 55,000 random drug tests of employees in two years, after having only 120 for-cause tests

in the previous two years before implementation of random testing.

For-cause testing alone is *not* sufficient. It quite obviously does not have the same deterrent impact (how could it – the chances of being referred for a test are so small), and it results in dramatically fewer employee substance-abuse problems being identified.

Moreover, for-cause testing is less fair, more subjective, and more subject to abuse than random testing. In random testing programs, typically *every* employee has an *equal* chance of being selected for testing.

Finally, an individualized suspicion referral process rewards the good actors, the clandestine "sneaks," and the effective cheaters and "concealers."

It is dangerous and wrong to advance – as the Arizona Supreme Court has – the doctrine that individualized suspicion should be required for employee drug testing, and this position is clearly just as objectionable in the private sector as in the public sector.

B. THE ARIZONA SUPREME COURT'S DECISION CONFLICTS WITH THE WEIGHT OF LAW AND RECOGNIZED PUBLIC POLICY.

The Arizona Supreme Court's decision conflicts with the overwhelming majority of the decisions regarding random drug testing for safety-sensitive employees. Similarly, the U.S. Congress, various federal agencies, and a significant number of states have recognized the necessity for random drug testing of employees in safety-sensitive positions, and the appropriateness of random drug testing overall for *any* employee.

(1) <u>The U.S. Supreme Court Has Supported Testing for Safety-Sensitive Employees</u>.

In each of the three cases in which the United States Supreme Court has addressed the issue of workplace drug testing, the Court has upheld drug testing.[2] In two of the cases in which the U.S. Supreme Court has addressed drug testing in the public sector, the Court has similarly supported the propriety of drug testing.[3] More importantly, the U.S. Supreme Court has recognized the critical interests in ensuring a safe workplace and requiring testing of employees working in dangerous positions. *See, e.g., National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989).

Federal courts have followed the U.S. Supreme Court's lead and have consistently upheld the random testing of safety-sensitive employees, including *specifically* the random testing of firefighters.[4] Nonetheless, the Arizona

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[2] *See Eastern Associated Coal Corp. v. United Mine Workers of Amer.*, 531 U.S. 57 (2000); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989).

[3] *See Board of Educ. of Indep. Sch. Dist. No. 9 v. Earls*, 122 S. Ct. 2559 (2002); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995). In *Chandler v. Miller*, 520 U.S. 305 (1997), the U.S. Supreme Court held that Georgia's requirement that candidates for office take and pass a drug test to qualify for high office was not constitutional. This case is not relevant to random testing in the workplace.

[4] *See, e.g., Hatley v. Department of the Navy*, 164 F.3d 602 (Fed. Cir. 1998) (firefighters); *Dimeo v. Griffin*, 943 F.2d 679 (7th Cir. 1991); *International Bhd. of Teamsters v. Department of Trans.*, 932 F.2d 1292 (9th Cir. 1991); *Hartness v. Bush*, 919 F.2d 170 (D.C. Cir. 1990); *Penny v. Kennedy*, 915 F.2d 1065 (6th Cir. 1990) (firefighters); *Thompson v. Marsh*, 884 F.2d 113 (4th Cir. 1989); *Guiney v Roache*, 873 F.2d 155 (1st Cir. 1989); *Policemen's Benevolent Ass'n of New Jersey, Local 318 v. Township of Washington*, 850 F.2d 133 (3d Cir. 1988); *Rushton v.*

Supreme Court has chosen to ignore these well-established precedents, by holding that Mesa's random testing of its firefighters violates the Fourth Amendment of the U.S. Constitution.

(2) The U.S. Congress and Federal Agencies Support Testing for Safety-Sensitive Employees.

The Federal Government has repeatedly and enthusiastically embraced random drug and alcohol testing as a useful tool to prevent employee substance abuse and to protect employees and the public at large. Together, the Executive and Legislative Branches of our Government have adopted a widespread and well-established national policy decisively *in favor* of the use of random testing.

For example, in 1991, the U.S. Congress enacted the Omnibus Transportation Employee Testing Act ("OTETA"), 49 U.S.C. § 5331 (1991), mandating the drug and alcohol testing of safety-sensitive employees in transportation-related jobs. In response to OTETA, the DOT established mandatory substance-abuse-prevention requirements for 8.1 million private-sector workers in safety-sensitive transportation-related positions.[5] These requirements include comprehensive random drug and alcohol testing of these safety-sensitive employees. The DOT specifically recognized the necessity of random testing to help minimize the negative consequences of substance abuse by employees, and to help protect the safety and health of employees and the public at large.

Nebraska Pub. Power Dist., 844 F.2d 562 (8th Cir. 1988); *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986).

[5] *See* 14 C.F.R. Part 121, Appendices I and J (2003); 46 C.F.R. Part 16 (2003); 49 C.F.R. Part 199 (2003); 49 C.F.R. Part 219 (2003); 49 C.F.R. Part 382 (2003); 49 C.F.R. Part 655 (2003).

Similarly, the Departments of Energy and Defense, and the Nuclear Regulatory Commission have issued regulations requiring drug testing of their safety-sensitive employees and the employees of their contractors.[6] Again, these regulations require widespread random testing.

Congress and these federal agencies have recognized the necessity for random testing of safety-sensitive employees. The Arizona Supreme Court's decision conflicts with this virtually universal legal principle.

(3) Many States Support Random Testing.

Although nearly half of the states have not addressed drug testing requirements at all,[7] the clear majority of the states that have done so permit, encourage, and/or require random testing. A number of states have voluntary workers' compensation testing laws, under which employers receive a premium discount on their workers' compensation premiums if they choose to implement a drug-testing program in compliance with the statute. Of those, seven permit random testing and two require random testing regardless of whether the employee is – or is not – specifically a safety-sensitive employee.[8] These states have recognized that drug testing, and random drug testing in particular, reduce the frequency and severity of accidents. They *reward* employers for acting responsibly to reduce drug abuse in its workplace.

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[6] *See* 10 C.F.R. Part 26 (2003); 10 C.F.R. Part 707 (2003); 48 C.F.R. § 252.233-7004(c)(4)(i)(2003).

[7] Twenty-three states do not address the permissibility or impermissibility of random drug testing.

[8] Alabama, Arkansas, Florida, Georgia, Mississippi, Ohio, and Tennessee encourage random drug testing in the private sector as part of their workers' compensation testing programs. Ohio requires random testing for an increased discount, and South Carolina requires random testing for *any* workers' compensation discount.

Other states have recognized the importance of a drug-free workplace beyond simply a reduction in accidents and injuries. Several states have voluntary testing laws which permit – indeed, encourage – an employer to randomly test all of its employees.[9] Other states specifically permit random testing under their mandatory testing laws.[10]

Finally, a few states permit random testing of only safety-sensitive employees, recognizing the substantial and specific need for such testing to help prevent the detrimental effects of substance abuse to the health and safety of the employees, themselves, their co-workers, and the public at large.[11] Thus, even those states that have expressed some concerns regarding random drug testing, have consistently recognized that random testing is – at a minimum – essential for *safety-sensitive* employees, such as those who are the subject of *Petersen v. City of Mesa*.

The clear public policy of these states – indeed *all* states that have addressed the issue of random testing (except, ostensibly, Arizona) – is that random testing is a positive and necessary tool for combating substance abuse in the workplace and preventing the negative consequences of substance abuse, including workplace accidents.

IV. CONCLUSION

The Arizona Supreme Court's decision constitutes an unnecessary and inappropriate retreat in the war on drugs,

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[9] The states include Alaska, Arizona, Idaho, Mississippi, and Utah.

[10] Iowa, Kansas, Louisiana, Maine (for 50 or more employees), Maryland, Nebraska, North Carolina, Oklahoma, and Oregon, as well as Puerto Rico.

[11] These states include Connecticut, Minnesota, and Montana. Other states' case law limits random testing to safety-sensitive employees: Massachusetts, New Jersey, and West Virginia

would undermine the philosophical rationale behind *random* drug testing, would ignore its deterrent and detection impacts, would embolden the employee drug abusers, and their suppliers and defenders, would create a plethora of new and counterproductive litigation, would have a "chilling effect" on employers' commitment to drug-free workplaces and drug testing, and could ultimately create thousands of less safe workplaces and put millions of Americans' health and safety in jeopardy. This *all* would be *decisively* against American society's interests.

The Institute for a Drug-Free Workplace respectfully urges the United States Supreme Court to grant the Petitioners the writ of *certiorari* to review the judgment below, and to reverse the Arizona Supreme Court's decision on *Petersen v. City of Mesa*, and therefore to uphold the random drug testing of the City of Mesa's firefighters as Constitutional.

Respectfully submitted,

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